Supreme Court, U. S.
FILED
JUN 8 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1699

VIRGIL AYERS, W.C. MEADERS, JR.,
VOYCE BLACKMON and JOE ACKER,

Petitioners,

v.

SPARTAN GRAIN & MILL COMPANY,

Respondent.

BRIEF IN OPPOSITION

JOHN C. BUTTERS
2403 Nat'l. Bank of
Georgia Building
Atlanta, Georgia 30303

J. VINCENT COOK
COOK, NOELL, BATES
& WARNES
P.O. Box 1927
Athens, Georgia 30601

May 23, 1979

Washington, D.C. • THIEL PRESS • (202) 638-4821

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 1

QUESTION PRESENTED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT:

I. The opinion below exactly follows the rationale of the Supreme Court in Fortner II and is fully supported by that opinion 4

II. There is no conflict between Circuits 5

CONCLUSION 6

TABLE OF AUTHORITIES

Cases:

Moore v. Jas. H. Matthews & Co., 550 F.2d 1207 (9th Cir. 1977) 5

Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958) 3

United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977) (Fortner II) 2, 3

Spartan Grain & Mill Co. v. Ayers, et al., 591 F.2d 419 (9th Cir. 1978) 1

Statutes:

Sherman Antitrust Act of 1890, Section 1, 15 U.S.C. §1 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1699

VIRGIL AYERS, W.C. MEADERS, JR.,
VOYCE BLACKMON and JOE ACKER,

Petitioners,

v.

SPARTAN GRAIN & MILL COMPANY,

Respondent.

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is *Spartan Grain & Mill Co., v. Ayers et. al.*, 581 F.2d 419 (5th Cir. 1978) and is reprinted as the Appendix to the Peitition for Writ of Certiorari.

JURISDICTION

The Petition accurately states the jurisdiction of the Court.

QUESTION PRESENTED

Does *Fortner II*[1] demand that Spartan's program was not a per se illegal tie-in where there was no showing that Spartan had a competitive advantage in the market for the tying product?

STATEMENT OF THE CASE

Judge Wisdom's decision below, articulately sets out the background history of the poultry industry, and accurately states the factual setting of this case. Rather than recite such detailed information in this brief, Spartan directs the Court's attention to the Fifth Circuit opinion in the event the Court desires detailed factual material. Here, Spartan will highlight only certain key facts.

As was mentioned by the lower court decision, there are several distinct steps in the production of broiler chickens. Following World War II, the companies in the industry moved toward the consolidation of these steps of production under one roof. As a result of this integration of the industry, independent segments of the industry which did not consolidate, like Spartan, a feed company, had no markets for their product. Similarly, the independent farmer lost a market in which to sell his hatching eggs.

In the late 1960's Spartan established a program which would give Spartan a market for its feed and at the same time provide the farmer a market for his hatching eggs. Spartan negotiated with broiler hatcheries in Pennsylvania and Ohio for commitments to buy hatching eggs,

[1] *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 97 S.Ct. 861, 51 L.Ed.2d 80 (1977) (Fortner II).

and also arranged with primary breeders to produce flocks of laying chicks. This enabled Spartan to offer a program to the farmer, producer, whereby Spartan would purchase the eggs from the producer's flock and the producer would feed Spartan feed to his birds.

The producers entered numerous contracts with Spartan on a yearly basis from the late 1960's until 1971 and 1972 when Spartan phased out its program. In November, 1972 Spartan filed suit in federal court against producers Ayers, Blackman, and Meadors for unpaid balances of their feed accounts and the producers filed an antitrust counterclaim. Together with Mr. Acker, who filed his antitrust suit in August, 1973, the producers challenged Spartan's program as a per se illegal tying arrangement and a per se illegal reciprocal dealing arrangement in violation of section 1 of the Sherman Act, 15 U.S.C. §1.

Ultimately, the trial court directed a verdict against Spartan at the close of the producers' evidence, holding that the program was a per se violation of section 1 of the Sherman Act. The trial court reasoned that whether viewed as reciprocal dealing or as a tie-in, the program was a per se illegal tying arrangement under *Northern Pacific Railway Co. v. United States,* 356 U.S. L, 78 S. Ct. 514, 2L.Ed.2d 545 (1957). On appeal to the United States Court of Appeals for the Fifth Circuit, Judge Wisdom, reversed and remanded under *United States Steel Corp. v. Fortner Enterprises, Inc.,* 429 U.S. 610, 97 S.Ct.861, 51 L.Ed2d 80 (1977) (Fortner II), stating that the program was not per se illegal. On remand the producers must prove that Spartan had the economic power in the market of the tying product (purchase of eggs) in the form of a cost advantage over its competitors. This was the very test articulated by the Supreme Court in *Fortner II.*

REASONS FOR DENYING THE WRIT

I.

THE OPINION BELOW EXACTLY FOLLOWS THE RATIONALE OF THE SUPREME COURT IN FORTNER II AND IS FULLY SUPPORTED BY THAT OPINION.

In discussing the *Fortner II* decision, the court below stated in pertinent part as follows:

> The only issue was whether Fortner had shown that U.S. Steel had economic power in the market for the tying product, credit . . .
>
> The Court found the size of U.S. Steel irrelevant. . . The Court also found that the number of tying arrangements U.S. Steel entered did not show the economic power. . . The Court put the uniqueness question in a nutshell: "In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product". . .
>
> "Quite clearly, if the evidence merely shows that credit terms are unique because the seller is willing to accept a lesser profit—or to incur greater risks—than its competitors, that kind of uniqueness will not give rise to any inference of economic power in the credit market. . .
>
> Without any evidence that the Credit Corp had some cost advantage over its competitors—or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected—the unique character of its financing does not support the conclusion that petitioners had the kind of economic power which Fortner had the burden of proving in order to prevail in this litigation." 429 U.S. at 621-22, 97 S.Ct. at 868.

In applying the *Fortner II* standard to the case at bar, Judge Widsom stated:

> Yet, although Spartan's program was "without like or equal" in that area of Georgia, it was not shown to be unique in the sense required in Fortner II. There was no evidence as to why Spartan was the only firm offering this package. There was no evidence that Spartan had any cost advantage over its rivals. In fact, the eventual termination of the program might support in inference that Spartan had no advantages over its rivals; instead, it may have made a mistake they avoided. Nothing presented in the district court showed that Spartan's program was significantly differentiated from that which other (companies) could offer if they so elected . . . In light of Fortner II, therefore, the requirements for finding a per se violation of the antitrust laws were not shown.

Accordingly, the Fifth Circuit correctly applied *Fortner II,* and it is unnecessary for the Supreme Court to grant the petition for a writ of certiorari in the present case.

II.

THERE IS NO CONFLICT BETWEEN CIRCUITS

In their petition for writ of certiorari the producers suggest that Judge Wisdom's decision in the court below is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Moore v. Jas. H. Matthews & Co.,* 550 F.2d 1207 (9th Cir. 1977). The petitioner however, fails to discuss any such conflict; and, indeed, no conflict appears upon reading the two decisions.

CONCLUSION

Judge Wisdom correctly applied the guidelines of Fortner II in disposing of the producer's antitrust claims, and the decision is not in conflict with other circuits. Accordingly, Spartan respectfully urges that the petition for a writ of certiorari be denied.

Respectfully submitted,

JOHN C. BUTTERS
2403 National Bank
of Georgia Building
34 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 688-0440
Counsel for Respondent.